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No. 899

In the Supreme Court of the United States

OCTOBER TERM, 1969

COMMUNITY FUNDING CORPORATION, PETITIONER

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES; HAROLD E. WALTON, CUSTODIAN OF RECORDS, FEDERAL HOUSING ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

BRIEF FOR RESPONDENT WALTON IN OPPOSITION

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OPINIONS BELOW

The opinion of the Superior Court of California for the County of Los Angeles (Pet. App. B) is unreported. Neither the Supreme Court of California nor the Court of Appeal rendered an opinion.

JURISDICTION

The judgment of the Court of Appeal (Pet. App. A) was entered on September 2, 1969, and a petition for hearing in the Supreme Court of California was denied on October 29, 1969. The petition for a writ of certiorari was filed on December 2, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

373-107—70

QUESTION PRESENTED

Whether the courts below properly applied this Court's decision in *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462, in refusing to enforce a subpoena duces tecum against a subordinate federal official who had been ordered by his superiors not to produce certain documents.

STATUTES AND REGULATIONS INVOLVED

The Federal Housekeeping Statute, 5 U.S.C. (Supp. IV) 301, is set forth at Pet. App. C; 24 C.F.R. 15.21 and 15.52 are set forth at Pet. App. E.

STATEMENT

On May 9, 1969, in the course of discovery proceedings in a civil action between private litigants in California State courts, petitioner, the plaintiff in that suit, sought the production of certain internal records of the Federal Housing Administration which were in the custody of respondent Harold E. Walton, Custodian of Records, Federal Housing Administration. Pursuant to California discovery practice, a subpoena duces tecum was issued by respondent Superior Court and served upon Walton. On June 9, 1969, the Federal Housing Administration moved to quash the subpoena duces tecum on two grounds: (1) that the information sought was protected from disclosure under both the Freedom of Information Act, 5 U.S.C. 552(b)(5), and applicable regulations of the Department of Housing and Urban Development, 24 C.F.R. 15.21, and (2) that under the rule

announced in *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462, a subpoena duces tecum is ineffective against a subordinate federal official who has been instructed by his superiors not to produce documents. On July 3, 1969, the FHA submitted a supplemental memorandum in support of the motion to quash, further stressing the State court's lack of authority, under *Touhy*, to compel respondent Walton to comply with the subpoena. On July 10, 1969, the motion to quash the subpoena duces tecum was denied by the Superior Court.

After denial of the motion to quash, Walton appeared and refused to produce the documents on the ground that he had been so instructed by his superiors in Washington. Petitioner then moved for an order compelling the production of the documents. Relying principally on this Court's decision in *Touhy* v. *Ragen, supra*, the court denied the motion, stating that such an order would be an "idle act" (Pet. App. B). A petition for a peremptory writ of mandate was denied by the Court of Appeal for the Second Appellate District, and on October 29, 1969, the California Supreme Court denied the petition for a hearing.

ARGUMENT

The courts below correctly applied the clear directive of this Court's decision in *Touhy* v. *Ragen* in refusing to compel a subordinate federal official to produce agency records against the instructions of his superiors. The underlying policy of that decision is the necessity of consistent and responsible decision-making on the question of disclosure of federal docu-

ments and records. As the Court stated (340 U.S. at 468):

> When one considers the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure in court, the usefulness, indeed the necessity, of centralizing determination as to whether subpoenas *duces tecum* will be willingly obeyed or challenged is obvious. * * *

The rule announced in *Touhy* deals with the procedure for obtaining federal documents and not the question whether or not the documents must be disclosed; the requisite jurisdiction over the Secretary of Housing and Urban Development, in order to reach the merits of his refusal to produce the documents, was lacking in this case.

Contrary to petitioner's contention, the authority of *Touhy* and its predecessor, *Boske* v. *Comingore*, 177 U.S. 459, has not been undermined by subsequent legislation. Both *Touhy* and *Boske* relied on the Federal Housekeeping Statute, 5 U.S.C. 22,[1] which prior to 1958 provided:

> The head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

In response to objections that this statute had been invoked as authority for non-disclosure on the sub-

[1] Now 5 U.S.C. (Supp. IV) 301.

stantive question whether the government was permitted to withhold information in official records, Congress amended the statute in 1958 to add the following sentence:

> This section does not authorize withholding information from the public or limiting the availability of records to the public.

This amendment, however, does not affect the rule of *Touhy* and *Boske* that if a subordinate official is instructed to refuse to produce records, the court must acquire jurisdiction over the head of the department before it can compel disclosure of official information. All the amendment means is that, once such jurisdiction is obtained, the head of the department may not invoke the Housekeeping Statute to justify withholding information. In this case, for example, if a subpoena directed to the Secretary of HUD had been issued from the United States District Court for the District of Columbia, the Secretary could not refuse to comply on the basis of the Housekeeping Statute.[2]

The government raised its defense under *Touhy* in both the memorandum supporting its initial motion

[2] That the 1958 amendment was not intended to affect *Touhy* and *Boske* was made clear by Senator Johnston, the floor manager of the Senate bill, who stated during the Senate debate that those cases "would remain the law of the land." 104 Cong. Rec. 15695 (July 31, 1958). See also Wigmore, *Evidence* (McNaughton rev. 1961), Sec. 2378, p. 803, n. 14: "This amendment of course does not affect the rule laid down in United States ex rel. Toughy v. Ragen, 340 U.S. 462 (1951), to the effect that one must take his demand for information 'upstairs'": accord: 4 Moore, *Federal Practice*, para. 26.25, p. 1553, n. 5.

to quash the subpoena duces tecum, and the later supporting supplemental memorandum. The FHA also based its motion on the ground that the documents sought were not subject to disclosure, but in so doing it merely followed the established practice of presenting alternative arguments, thereby preserving the existing jurisdictional defense. In light of this consistent position on the jurisdictional question, petitioner's inference (Pet. 21) that *Touhy* was raised only after an adverse decision on the claim that the documents were not subject to disclosure is wholly unwarranted.

Petitioner also argues that the documents should be produced under the Freedom of Information Act. But the merits of petitioner's claim to inspect the documents under the Freedom of Information Act need not be reached here, because the State courts have no jurisdiction to enforce the Freedom of Information Act against government agencies. It is true that as between private parties State courts generally have concurrent jurisdiction to enforce federal rights.[3] But State courts do not have jurisdiction over agencies of the federal government, in the absence of an express grant of jurisdiction: the United States may be sued only according to the terms of a statute authorizing suit against the government. *United States* v. *King*, 395 U.S. 1; *United States* v. *Sherwood*, 312 U.S. 584. The Freedom of Information Act subjects federal agencies to suit in the federal courts, but makes no provision for State court jurisdiction. See 5 U.S.C.

[3] See cases cited at pp. 14–15 of the petition.

552(a)(3). Like other federal statutes creating rights enforceable against the government in the federal district courts,[4] the Information Act is not enforceable by suit against the government in the State courts.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[4] *E.g.*, the Tort Claims Act, 28 U.S.C. 1346(b); the Tucker Act, 28 U.S.C. 1491; the Suits in Admiralty Act, 46 U.S.C. 742.

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